exercises final approval authority over every aspect of the message; and (5) that the government is not limited to only final approval, but is involved in the design and shaping of the message. *Id.* at 561.

Here, the Sixth Circuit correctly applied the test articulated in *Johanns,* finding that the Act substantially mirrored the factors present in *Johanns*. *See* Pet. App. A11-A14. In summarizing, the Sixth Circuit stated:

> *Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes. In this case, *Johanns* requires the court to conclude that "Choose Life" is Tennessee's message because the Act determines the overarching message and Tennessee approves every word on such plates.

Pet. App. A11.

In applying the *Johanns* test for government speech, the Sixth Circuit correctly found that the Tennessee legislature set the overall and specific message when it authorized the "Choose Life" specialty plate. As in *Johanns*, while Tennessee allows partial participation by another party, New Life Resources, in the design of the plate, the State retains a veto over the design and its message. "Tennessee's statutory law, and its power to withdraw authorization for any license plate, gives the State the right to wield 'final approval authority over every word used' on the 'Choose Life' plate." Pet. App. A12. The Sixth Circuit noted that, under *Johanns*, "a government crafted message is government speech even if the Government does not explicitly credit itself as the

speaker." In any event, the Sixth Circuit correctly concluded that a reasonable person knows that the medium for the message in this case, a "government-issued license plate," is government-issued and "a fortiori conveys a government message." Pet. App. A14.

The Sixth Circuit is thus the first circuit court to have had the opportunity to apply *Johanns* in the context of a First Amendment challenge to a speciality license plate. Indeed, the Sixth Circuit appears to be the first circuit court to have had the opportunity to apply *Johanns* substantively to *any* First Amendment challenge. *Cf. Pelts & Skins, LLC v. Landreneau*, 2006 WL 1163855 (5th Cir. May 3, 2006) (vacating prior opinion and remanding for reconsideration of government speech question under *Johann*'s "now-governing standard"); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2005) (stating in postscript to prior opinion that *Johanns* "affirms our reasoning" on government speech question); *Charter v. United States Department of Agriculture*, 412 F.3d 1017 (9th Cir. 2005) (resubmitting appeal in light of *Johanns* and remanding for further proceedings). As the Sixth Circuit observed, the Fourth Circuit's decision in *PPSC* is "in tension with the intervening case of *Johanns*." Pet. App. A21. "*Johanns* sets forth an authoritative test for determining when speech may be attributed to the government for First Amendment purposes. [*PPSC*] relied instead on a pre-*Johanns* four-factor test of the Fourth Circuit's own devising . . . ." *Id.*[9]

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[9]Indeed, the "degree of governmental control over the message," which was key to this Court's finding of government speech in *Johanns*, *see* 544 U.S. at 561, is but one of the four factors considered by the Fourth Circuit in *PPSC*. *See* 361 F.3d at 793.

Petitioners support their bid for review by citing a litany of cases pending in a number of circuit or district courts that involve like challenges to a "Choose Life" plate, Pet. 15-16, arguing that the "sheer number" of these challenges demonstrates the need for a "unifying response" from this Court. But that response has already come and the fact that several cases are currently pending in the lower courts is all the more reason for this Court to deny review and afford these courts the same opportunity as had the Sixth Circuit to apply *Johanns*. Just as consideration of the "government speech" theory proved to present "a solution to the problem presented by [the checkoff assessment] cases" in *Johanns*, 544 U.S. at 569 (Breyer, J., concurring), so too may that theory prove to be the solution to the problem presented by the many "Choose Life" license plate cases. Contrary to petitioners' assertions, this theory, as adopted in *Johanns* and as applied in this case by the Sixth Circuit, comports fully with this Court's prior decisions. *See Rosenberger v. Rector and Vistiors of Univ. Of Va.*, 515 U.S. 819, 833 (1995) (viewpoint-based decision may be sustained where government uses private speakers "to convey a governmental message"). *Cf. Legal Services Corporation v. Velazquez*, 531 U.S. 533, 542 (2001) (serious restrictions on client advocacy may not be part of a legal services program that "was designed to facilitate private speech, not to promote a governmental message");[10] *Wooley v. Maynard*, 430 U.S.

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[10]Petitioners argue that the Sixth Circuit decision conflicts with *Velasquez* because the Sixth Circuit failed to consider "the overall purpose of the specialty license plate scheme." (Pet. 23). But petitioners isolated their challenge to the statute that authorized the "Choose Life" license plate, and the district court expressly declined to address petitioners' separate challenge to the entire specialty plate program. (Pet. App. A53-A54). Consequently, the only question before the Sixth Circuit was whether the

705, 715 (1977) (invalidating state statute that "in effect *requires* that appellees use their private property as a 'mobile billboard' for the State's ideological message") (emphasis added). Therefore, in light of this Court's "government speech" test set forth in *Johanns,* there is no unsettled, important question of federal law that needs to be resolved.

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government's dissemination of the "Choose Life" message constituted government speech.

CONCLUSION

For all of the reasons stated above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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(3)

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In The

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, PLANNED PARENTHOOD OF MIDDLE AND EAST TENNESSEE, INC., SALLY LEVINE, HILARY CHIZ, JOE SWEAT, *Petitioners*,

v.

PHILIP BREDESEN, GOVERNOR OF TENNESSEE, GERALD F. NICELY, INTERIM COMMISSIONER OF SAFETY OF TENNESSEE, FRIENDS OF GREAT SMOKY MOUNTAINS NATIONAL PARK, A NON-PROFIT NORTH CAROLINA CORPORATION, NEW LIFE RESOURCES, INC., *Respondents*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Objection of Respondent New Life Resources, Inc., to Petition for Writ of Certiorari

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May 16, 2006

QUESTION PRESENTED BY RESPONDENT

Whether the Sixth Circuit correctly upheld a legislatively mandated social, economic, and educational program to encourage childbirth that specifically mandates publication of the message "Choose Life" on state vehicle specialty license plates, although the legislature refused to enact legislation enabling production of specialty plates with a "pro-choice" message.

CORPORATE DISCLOSURE STATEMENT

Respondent New Life Resources, Inc., does not have any stock owned by a publicly held corporation. It does not have a parent corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED BY RESPONDENT i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

REASONS FOR DENYING THE PETITION 1

I. *Johanns* Resolves Any Conflict Between the Sixth Circuit's and Fourth Circuit's Decisions 3

II. Other Challenges to Issuance or Rejection of "Choose Life" License Plates Programs Do Not Warrant the Conclusion that Petitioners' Question Presented Demands Resolution At This Time. 5

III. In the Wake of *Johanns*, Clarification of the Scope and Application of the Government Speech Doctrine Is Unnecessary to Alleviate Confusion Among Lower Courts 7

IV. The Sixth Circuit's Reasoning Is Consistent With This Court's Precedents 10

CONCLUSION 14

TABLE OF AUTHORITIES

Cases: **Page(s)**

Arizona Life Coalition, Inc. v. Stanton, No. CV-03-1691-PHX-PGR, 2005 WL 242811, 2005 U.S. Dist. LEXIS 21960 (D. Ariz. Sept.26, 2005), *appeal docketed*, No. 05-16971 (9th Cir. Oct. 18, 2005) 6

Chadwick v. Janecka, 302 F.3d 107 (3d Cir. 2002) ... 2 n.1

Children First Found., Inc. v. Martinez, Nos. 05-0567-CV, 05-1979-CV, 2006 WL 544502, 2006 U.S. App. LEXIS 5830 (2d Cir. Mar. 6, 2006) (unpublished) 4 n.3, 6

Choose Life Illinois, Inc. v. White, No. 1:04-CV-04316 (N.D. Ill. filed June 28, 2004) 6-7

Diamond v. Charles, 476 U.S. 54 (1986) 1 n.1

Didrickson v. U.S. Dep't of Interior, 982 F.2d 1332 (9th Cir. 1992) 2 n.1

Harris v. McRae, 448 U.S. 297 (1980)..... 10, 13

Henderson v. Stalder, 47 F.3d 351 (5th Cir. 2005), *petition for cert. filed sub nom., Keller v. Stalder*, No. 05-1222 (March. 21, 2006) 5 n.4, 6

Hill v. Kemp, No. 04-CV-0028-CVE-PJC (N.D. Okla. Aug. 16, 2005, *appeal docketed*, No. 05-05-5160 (10th Cir. Sept. 15, 2005) 6

Int'l Union of Mine Workers v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335 (1945) 1 n.1

Johanns v. Livestock Marketing Association, 544 U.S. 550, 125 S. Ct. 2055 (2005) ..... *passim*

Legal Services Corp. v. Velasquez, 531 U.S. 533 (2001) . 11

Maher v. Roe, 432 U.S. 464 (1977) 10, 13

Mich. State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997) 1 n.1

NARAL Pro-Choice Ohio v. Taft, No. 1:05- CV-1064, 2005 U.S. Dist LEXIS 21394, 2005 U.S. Dist. LEXIS 21394 (N.D. Ohio Sept. 27, 2005), *appeal docketed*, No. 05-4338 (6th Cir. Oct. 28, 2005) 6

Planned Parenthood of South Carolina v. Rose, 361 F.3d 786 (4th Cir. 2004), *reh'g en banc denied*, 373 F.3d 580, *cert. denied*, 543 U.S. 1119 (2005) 2, 3, 4, 5, 7

Poelker v. Doe, 432 U.S. 519 (1977) 10, 13

Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) .. 12

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 12-13

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995) 12

Rust v. Sullivan, 500 U.S. 173 (1991) 10, 13

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 1 n.1

Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Dept. of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002), *reh'g en banc denied*, 305 F.3d 241 (4th Cir. 2002) 7

Schulz v. Williams, 44 F.3d 48 (2d Cir. 1994) 2 n.1

Women's Emergency Network v. Bush, 323 F.3d 937 (11th Cir. 2003) 4, 6

Women's Resource Network v. Gourley, 305 F. Supp. 2d 1145 (E.D. Cal. 2004) 7

Wooley v. Maynard, 430 U.S. 705 (1997) 8, 10

Constitutional Provision:

U.S. Const. art. III 1-2 n.1

U.S. Const. amend. I ..... *passim*

Statutes & Rules:

Fed. R. Civ. P. 24 ..... 1 n.1

Tenn. Stat.§ 55-4-201(a)(3)(B) 1 n.1

U.S. Court of Appeals for the Second Circuit Rule 0.23 ..... 5 n.3

U.S. Sup. Ct. R. 10(a) 2

U.S. Sup. Ct. R. 10(c) 3

REASONS FOR DENYING THE PETITION

Respondent New Life Resources, Inc.[1] ("New Life"),

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[1]New Life, which intervened pursuant to Fed. R. Civ. Pro. 24 as a defendant in the District Court, is properly before this Court, as it was properly before the Sixth Circuit, because it has Article III standing. It has a specific and concrete financial interest in the outcome of this case.

The Sixth Circuit does not require intervenors to have Article III standing. *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). However, only New Life appealed the decision of the District Court. Pet. App. at 3. And this Court has held that "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Article III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986).

The pediatrician-intervenor in *Diamond* asserted a number of interests that he claimed provided him standing, but none were deemed sufficient to satisfy the Article III requirement. *Id.* at 65-68. In particular, he claimed an interest in a successful outcome of the litigation based on the prospect that, if the law at issue went into effect, then more children would be born and he would thus gain financially by virtue of more fee-paying patients. *Id.* at 66. However, as the *Diamond* Court held, "the possibilities that such fetuses would survive and then find their way as patients to Diamond are speculative, and 'unadorned speculation will not suffice to invoke the federal judicial power.'" *Id.* (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44 (1976)). The *Diamond* Court thus held the intervenor lacked Article III standing to appeal on such a basis.

In stark contrast, New Life has a vested financial interest in a portion of the funds that have already been paid by purchasers of the "Choose Life" plates to satisfy the requirement that funds for at least 500 such plates be presented to the State before production of the plates may begin. Tenn. Stat. § 55-4-201(a)(3)(B); Pet. App. at 65. The State specifically estimated the amount due to New Life for the first year alone of the program would be $14,000. Pet. App. 64. Thus, New Life suffers a concrete injury in fact as the result of this action – an injury that will be redressed if it succeeds in this case. As a consequence, it has standing to pursue this appeal even in the absence of the State as an appellant. *See, e.g., Int'l Union of Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338-39 (1945), which upheld intervenor-unions' standing to appeal denial of NLRB's petition to vacate portion of decree dealing with back pay where NLRB had

argues that petition for writ of certiorari in this case should be denied as resolved by this Court's decision in *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 125 S. Ct. 2055 (2005). The decision here is in technical conflict with the decision of U.S. Court of Appeals for the Fourth Circuit in *Planned Parenthood of South Carolina v. Rose*, 361 F.3d 786 (4th Cir. 2004), *reh'g en banc denied*, 373 F.3d 580, *cert. denied*, 543 U.S. 1119 (2005) ("*PPSC*"). However, the intervening decision of the Court in *Johanns* effectively overrules *PPSC* by virtue of its reasoning on the nature of government speech. *Cf.* U.S. Sup. Ct. R. 10(a).

There are a number of cases involving "Choose Life" specialty license plates pending in federal courts throughout the country. However, these too are now properly resolved by application of *Johanns*, thus obviating the need for any guidance toward resolution by this Court. Similarly, *Johanns* now provides clear guidance on the proper application of the government speech doctrine, alleviating any confusion that might have previously existed below. Finally, the decision in

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not sought Supreme Court review). *See also Chadwick v. Janecka*, 302 F.3d 107, 112-15 (3d Cir. 2002) (permitting intervenor wife standing to appeal ruling freeing husband from incarceration for civil contempt of order requiring him to pay into escrow account for wife's benefit when the State did not appeal, where wife had Article III standing by virtue of her financial injury and her injury could be redressed by reversal that would require husband to remain incarcerated until he paid funds into escrow account); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (permitting political opponents to intervene for purposes of appealing preliminary injunction preventing enforcement of determination that political party's nominating petitions were invalid, after state decided not to appeal to defend constitutionality of its statutes); *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1339 (9th Cir. 1992) (allowing defendant-intervenor industry groups to appeal to defend federal regulation where government abandoned its appeal and court held that defendant-intervenor had independent Article III standing and could benefit from reversal of lower court decision).

this case is in accord with *Johanns*, which is itself in accord with well-established precedents of this Court. *See Johanns*, 125 S. Ct. at 2064-65, and the cases there cited. *Cf.* U.S. Ct. R. 10(c).

I. *Johanns* Resolves Any Conflict Between the Sixth Circuit's and Fourth Circuit's Decisions.

Although there would appear to be a conflict between the Sixth Circuit's decision here and the Fourth Circuit's decision in *PPSC*, the conflict was actually resolved by the intervening decision of this Court in *Johanns*. *PPSC* was fully decided prior to the decision in *Johanns*, and *Johanns* was decided while this case was being briefed before the Sixth Circuit. In following *Johanns*, the Sixth Circuit thus simply applied the most recent precedent of this Court on the nature of government speech – a precedent unavailable at the time *PPSC* was decided.

As Petitioners[2] state, *PPSC* is "a case virtually identical to this one." Pet. at 13. Indeed, the South Carolina and Tennessee "Choose Life" specialty plate statutes operate in the same way. Under both statutes, the "Choose Life" message is dictated by the legislature. Under both statutes, the State maintains final control over the message and the manner in which it is to be communicated. Thus, following *Johanns*, the "Choose Life" message on both the Tennessee and South Carolina plates should properly be deemed "government speech" because, in both cases, "the government determines an overarching message and retains power to approve every word disseminated at its behest." Pet. App. A10 (*citing Johanns*, 125 S. Ct. at 2062-66).

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[2]American Civil Liberties Union of Tennessee, Planted Parenthood of Middle and East Tennessee, Inc., Sally Levine, Hilary Chiz, and Joe Sweat (the "Petitioners").

Just as in *Johanns*, the message here and in *PPSC* qualifies as government speech because "from beginning to end [it is] the message established by [the State]." 125 S. Ct. at 2062. Just as in *Johanns*, the State here and in *PPSC* stated the "overarching message and some of its elements," leaving only some "remaining details to an entity" that is answerable to the State. *Id.* at 2063. Just as in *Johanns*, the State here and in *PPSC* "exercises final approval authority over every word used in every promotional campaign." *Id.* It follows that, because in all three cases "the government sets the overall message to be communicated and approves every word that is disseminated," *id.*, the speech involved is government speech.

Thus, any conflict between the Sixth and Fourth Circuits in this regard is more apparent than real. Moreover, there is not any other conflict warranting Supreme Court review on this matter. The Eleventh Circuit – once again, prior to *Johanns* – did comment that it "fail[ed] to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages constitute government speech." *Women's Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003). But this was mere dictum because the Court held that the plaintiffs lacked standing and that it lacked jurisdiction to hear the merits of the case. *Id.* at 949.[3] This Court should not, therefore, review this case based

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[3]Both the dissent in the decision below, Pet. App. A22 n.2 (Martin, J., concurring in part and dissenting in part), and the Petitioners, Pet. at 11 n.7 and 15, also cite as conflicting authority *Children First Found., Inc. v. Martinez*, Nos. 05-0567-CV, 05-1979-CV, 2006 WL 544502, 2006 U.S. App. LEXIS 5830 (2d Cir. Mar. 6, 2006) (unpublished). In *Martinez*, the Second Circuit held defense of qualified immunity do not appear on the face of the complaint, it lacked appellate jurisdiction. 2006 U.S. App. LEXIS 5830, at *3. The court specifically declined to reach the merits of the issue, which involved whether New York should issue a "Choose Life" specialty plate. *Id.* Moreover, *Martinez* is an unpublished opinion and a summary

on a conflict of circuits over the issue of whether there is a conflict of circuits over the messages on specialty license plates constitute government speech where, as here, the message of the plate is dictated and controlled by the government.[4]

II. Other Challenges to Issuance or Rejection of "Choose Life" License Plates Programs Do Not Warrant the Conclusion that Petitioners' Question Presented Demands Resolution At This Time.

Petitioners cite a number of cases in support of their claim that they present an important federal question that is "in need of a unifying response from the Court." Pet. at 15-16. As New Life has shown, the apparent conflict with *PPSC* is resolved by

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order, and under U.S. Court of Appeals for the Second Circuit Rule 0.23 (Dispositions in Open Court or by Summary Order):

> Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

[4]The Sixth Circuit decision at issue here did create a genuine conflict of circuits in holding that the federal Tax Injunction Act, 28 U.S.C. § 1341 ("TIA") did not apply to deprive federal courts subject matter jurisdiction over the Tennessee specialty plates program. *See* Pet. App. A5-A10. The Fifth Circuit earlier held that the TIA applies to Louisiana's "Choose Life" plate scheme. *Henderson v. Stalder*, 47 F.3d 351, 354-60 (5th Cir. 2005), *petition for cert. filed sub nom., Keller v. Stalder*, No. 05-1222(March. 21, 2006). In this case, the Sixth Circuit unanimously held that the TIA did not apply to the Tennessee "Choose Life" plates program. Pet. App. A5-A10; Pet. App. A22 (Martin, J., concurring in part and dissenting in part). New Life intends to file a Conditional Cross-Petition for Writ of Certiorari requesting review of the decision of the Sixth Circuit finding that the TIA does not apply to the Tennessee specialty plates program.